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Education Commission  
Office of Secretary

Re: Request for Review of the Decision of the Universal Service  
Administrator by Ysleta Independent School District; Schools and  
Libraries Universal Service Support Mechanism – CC Dkt. No. 02-6.

To Whom It May Concern:

We are filing via courier, 4 boxes containing an original and 14 copies of the Request for Review (with attached 3-volume Appendix) for Ysleta Independent School District on behalf of Clyde Pine, Jr. of Mounce, Green, Myers, Safi & Galatzan.

**An additional copy is enclosed in "Box #1 of 4" to be date-stamped and returned to us. Please give it to the courier to return to our offices.**

Should you have any questions or concerns, please contact me at (202) 857-2559. Thank you.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Michael Terrana'.

Michael Terrana  
Legal Assistant

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.**

In the Matter of:

Request for Review of the Decision of the  
Universal Service Administrator by

Ysleta Independent School District

Schools and Libraries Universal Service  
Support Mechanism

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CC Docket No. 02-6

**RECEIVED**

DEC 12 2005

Federal Communications Commission  
Office of Secretary

**REQUEST FOR REVIEW  
OF YSLETA INDEPENDENT SCHOOL DISTRICT**

Clyde A. Pine, Jr.  
Mounce, Green, Myers, Safi & Galatzan  
A Professional Corporation  
P.O. Drawer 1977  
El Paso, Texas 79950-1977  
(915) 532-2000  
Fax: (915) 541-1597

Attorneys for Ysleta Independent School District

December 7, 2005.

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.**

In the Matter of:	§	
	§	
Request for Review of the Decision of the	§	
Universal Service Administrator by	§	
	§	
Ysleta Independent School District	§	CC Docket No. 02-6
	§	
	§	
Schools and Libraries Universal Service	§	
Support Mechanism	§	

**REQUEST FOR REVIEW  
OF YSLETA INDEPENDENT SCHOOL DISTRICT**

***I. INTRODUCTION***

Ysleta Independent School District ("YISD"), by its attorneys, hereby requests review by the Federal Communications Commission (the "Commission") of the Administrator's Decision on Appeal - Funding Year 2000-2001 dated October 18, 2005 issued by the Universal Service Administrative Company, Schools and Libraries Division (the "Decision"). A true and correct copy of the Decision is set forth as Exhibit "21" to the accompanying Appendix, and is incorporated herein. This Request for Review is made by YISD pursuant to 47 C.F.R. §54.719.

By the Decision, the Universal Service Administrative Company, Schools and Libraries Division (collectively, the "SLD") denied YISD's appeals of that certain Recovery of Disbursed Funds Letter dated May 13, 2004 from the SLD (the "Recovery Letter") and that certain Demand Payment Letter dated April 19, 2005 from the SLD (the "Demand Letter"). True and correct copies of the Recovery Letter and the Demand Letter are set forth as Exhibits "17" and "19" of the

Appendix. YISD timely filed a Letter of Appeal dated July 6, 2004 to the SLD, appealing the Recovery Letter (the "First Letter of Appeal"). A true and correct copy of the First Letter of Appeal, without exhibits<sup>1</sup>, is set forth as Exhibit "18" in the Appendix. YISD timely filed a Letter of Appeal dated May 12, 2005 to the SLD, appealing the Demand Letter (the "Second Letter of Appeal"). A true and correct copy of the Second Letter of Appeal is set forth as Exhibit "20" in the Appendix.

The Decision denies the First Letter of Appeal and the Second Letter of Appeal. This Request for Review is timely made within sixty days of the date of the Decision.

By means of the Recovery Letter and the Demand Letter, the SLD requests recovery, and demands, from YISD the sum of \$208,990.80 (the "Disputed Funds") in connection with YISD's Form 471 Application Number 179273 (the "Year 3 Form 471") for Funding Year 2000-2001 a/k/a "Year 3" of the E-Rate Program (the "Program").<sup>2</sup> The Decision effectively upholds the SLD's demands upon YISD

For the reasons set forth below, the Decision is erroneous, and the Commission should reverse the Decision.

## ***II. SUMMARY***

In the Decision, the SLD essentially contends that YISD failed to properly use a number of routers acquired using Program funds under Year 3 of the Program, and is seeking recovery of Program funds used by YISD to acquire those routers.

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<sup>1</sup> Exhibits 1 through 16 in the Appendix are identical to the exhibits to the First Letter of Appeal.

<sup>2</sup> The SLD used to refer to funding years as Year 1, Year 2, etc., but changed the terminology of the Year 5 funding year to Year 2002, with similar changes for subsequent years of the Program. This Letter of Appeal will use the term "Year 3" to refer to Funding Year 2000-2001, "Year 4" to refer to Funding Year 2001-2002, "Year 5" to refer to Funding Year 2002-2003, "Year 6" to refer to Funding Year 2003-2004, and "Year 7" to refer to Funding Year 2004-2005.

The contentions of the SLD are without merit. YISD in fact installed used the routers for their intended purpose in connection with an existing computer network at YISD for a period of time. Thereafter, in light of numerous and serious problems experienced with the then-existing network at the classroom level, and upon careful and extensive review and deliberation, YISD decided to replace the old network with a high speed wide area network in an effort to address those problems. The new computer network, however, did not require use of the routers at issue. Rather than let the routers go to waste or transfer them to ineligible locations, YISD, after removing, tagging, and securing those routers, sought new, alternative uses for the routers for Program-eligible projects at eligible schools. Several unsuccessful efforts to obtain Program-funding for the new projects using the routers ensued. By the time funding was finally awarded for the project originally expected to use the routers, technological changes had rendered the routers obsolete for such project. YISD then discovered a new use for the routers for a Program-eligible project at eligible locations. YISD, though, used its own funds for the new project, even though it was Program-eligible. The routers in question were then installed and have been used for several years at eligible locations for that Program-eligible project. The Program rules in effect at the relevant time period did not forbid even the much worse practice of several annual replacement of Program-acquired equipment or transfer of Program-acquired equipment to ineligible locations, much less the conduct at issue here.

Consequently, there is no basis for requiring return of Program funds from YISD for these routers, and the Decision should be reversed.

### ***III. FACTUAL BACKGROUND***

In order to understand the erroneous conclusion in the Decision, it is important to review the factual circumstances of the conduct of YISD upon which the Decision is apparently based.



In the first place, YISD adopted a Long-Range Information Technology Plan in March 1998 (the "1998 Technology Plan"). A true and correct copy of the 1998 Technology Plan, with supplements and amendments, is set forth as Exhibit "1" to the Appendix and is incorporated herein. The 1998 Technology Plan contemplated that YISD would acquire the necessary technology to establish and maintain an adequate computer network at YISD.

As used in the technology area at the time, the term "network" referred to a system of computers interconnected by telephone lines or cables, permitting the sharing of information and data amongst those computers. The term "router" is used to describe a device which handle message transfers within or between computer networks, by forwarding packets of data according to set protocols and instructions.

The 1998 Technology Plan was later superseded by an Information Technology Plan 2001-2004 (the "2001 Technology Plan"). A true and correct copy of the 2001 Technology Plan, with supplements and amendments, is set forth as Exhibit "2" to the Appendix and is incorporated herein. The 2001 Technology Plan also contemplated the acquisition and maintenance of a sufficient computer network at YISD facilities.

In 1999, YISD had a limited computer network in place. YISD had three IBM 6611 routers and more than fifty Kentrox CSU/DSU's [one for each school] located at Central Office. These units then connected via a T1 line to another Kentrox CSU/DSU at each campus and into an IBM 2210 router. At the campuses, connectivity from the desktop to the network was accomplished through IBM 8224 Ethernet Stackable Hubs. At YISD's Central Office, connectivity from the desktop to the network was done with IBM 8260 Ethernet Blade Center Hubs. The IBM 2210 routers were later taken off the market.

Such network of YISD, however, was obsolete and was insufficient to meet the educational needs of YISD students and the goals of the 1998 Technology Plan. YISD then decide to upgrade aspects of its existing computer network.

Pursuant to the 1998 Technology Plan, YISD decided to seek funding under Year 3 of the Program for various goods and services related to such network upgrade. On November 11, 1999, YISD posted a Form 470 on the SLD website in accordance with Program rules for "Router/Campus Network Electronics" (the "Year 3 Form 470").<sup>3</sup> A true and correct copy of the Year 3 Form 470 is set forth as Exhibit "3" to the Appendix and is incorporated herein.

After a competitive procurement process beginning on November 16, 1999, YISD awarded a contract to International Business Systems ("IBM") to provide the goods and services for the network electronics upgrade. A contract and statement of work between YISD and IBM for such work was signed on January 12, 2000 (the "Year 3 Contract"). A true and correct copy of the Year 3 Contract is set forth as Exhibit "4" to the Appendix and is incorporated herein.

Thereafter, YISD filed the Year 3 Form 471 with the SLD on or about January 17, 2000. A true and correct copy of the Year 3 Form 471 is set forth as Exhibit "5" to the Appendix and is incorporated herein. The Year 3 Form 471 and the Year 3 Contract provided for the installation, among other things, Cisco 2650 routers, installed, configured and tested, including implementation documentation at eligible YISD facilities specified for that funding year (the "Routers"). It should also be pointed out that, as a matter of maintaining equity between YISD campuses, YISD also

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<sup>3</sup> The Year 3 Form 470 is one of several Form 470s posted by YISD at the time, but is the one at issue in this Request for Review. For Year 3 of the Program, YISD submitted and treated separately particular projects. The Year 3 documentation described herein relates to that for the network electronics project. Similarly, the attached documentation for later Program years relates only to the relevant projects, and not to all projects for that year.

concurrently acquired and installed similar routers at over 20 schools [not eligible for Program funding], using its own funds and resources.

In short, the Year 3 Contract proposed replacement of the old routers with the Routers. YISD replaced these pre-existing routers for two primary reasons. In the first place, the IBM routers that were part of the original serial network were aging and their maintenance costs were becoming greater each year and units were beginning to fail and replacements were becoming scarce. Second, the IBM routers only supported 1 ethernet interface per router. This did not allow the district to accommodate the NetSchools Project, which had computers set up on a separate IP address scheme. It is also important to keep in mind, that, at the time of request for funding for the upgrade for such old routers, the high-speed WAN service [described further below] was not an offering that was fundable under Program guidelines. Even if it had been, it was cost-prohibitive to make the change at the time as the service offering far exceeded what the YISD found to be a reasonable price for the service at that time; subsequently, the pricing became much more favorable. The decision to upgrade the old routers was the only available, reasonable solution at that time.

The SLD approved the Year 3 Form 471 by means of a Funding Commitment Decision Letter dated May 5, 2000 (the "Year 3 Funding Letter"). A true and correct copy of the Year 3 Funding Letter is set forth as Exhibit "6" to the Appendix and is incorporated herein.

Between October 25, 2000 and November 5, 2000, the Routers were installed at the various YISD facilities, in accordance with the terms and conditions of the Year 3 Contract. All of the Routers were in fact installed at eligible facilities, at such locations and in such numbers as described in the Year 3 Form 471. The Routers were thereafter in fact used for the network operations at YISD.

Upon further review and reflection, and additional research and investigation, YISD determined that its existing computer network, even with the upgrades including the Routers, was insufficient to satisfy the ever-changing needs of its students and the ever-increasing demands for network capacity and speed. Changed circumstances required YISD to explore alternative methodologies of configuring its computer network, in order to meet instructional and related needs.

After extensive review, YISD decided that a “High-speed wide area network that utilized layer 3 switching” or “High-speed WAN” should be established as the network methodology for YISD facilities. A “High-speed wide area network”, in this context, means a computer network, usually constructed with leased high-speed [100 megabit] fiber optic lines, that provides coverage throughout the extensive YISD service area. It differs from the previous network by using layer 3 switching instead of routing, which increases network performance, and efficiency as well improves configuration flexibility and allows the use of standard Ethernet between locations, removing additional protocols from the transport. The components of a high-speed wide area network include a direct connection to the campus distribution switch, being a Cisco Catalyst 4908, via a managed 100 megabit leased fiber connection. The 4908 distribution switch was in place in conjunction with a network electronics upgrade that had been done in a previous year, and used in conjunction with the previous routed serial network. YISD’s intent in removing the Routers after the high-speed WAN upgrade was to avoid theft or damage for two reasons: first for the fiscal liability associated with any theft or damage and second to ensure that the Routers would be available for use with a proposed Voice Over IP project that had been submitted to the SLD as a funding request.

The chief benefits of a high-speed wide area network over the old network were improved performance, additional bandwidth available for future projects such as Voice Over IP, streaming

video, point to point video, or video on demand as well as other bandwidth intensive applications that were listed in the then-current Technology Plan. One of the chief complaints from YISD campuses that were utilizing the old network to do classroom work assignments via the Internet or using other network resources was that it was too slow. This slow-speed was due to saturation of the T-1 lines that previously provided service at YISD. Essentially, classroom Internet usage rates increased unexpectedly at YISD and demands on the system increased for that reason and due to increasing file sizes. One must also keep in mind that, during such time frame, the number and size of files or presentations available on the Internet for educational purposes also increased significantly. In other words, more websites often had more large, video or multi-media presentations available for review, contrary to prior times. With the old network, it was difficult, if not impractical, for YISD students to fully utilize such educational resources. More importantly, due to the slowness of the old network, it was often difficult for students to be able to even gain access to the Internet. Getting logged onto the Internet had become such a slow process that many teachers and students simply stopped trying to do so. In other cases, more persistent persons were able to get access, but the remaining classroom time to utilize the Internet resources was significantly reduced due to such delays. To be clear about the low speed of the old network, it needs to be pointed out that the Internet access speed on the old network was slower than a basic, dial-up, phone-line Internet access [which millions of people nationwide have rejected in favor of high-speed access, believing even that was too slow]. In short, the old network had become a serious detriment to the education of YISD students.

Once the high speed wide area network offering became reasonable and YISD could justify the expense in alignment with the updated version of the Technology Plan, YISD recognized that,

if it chose to install a high-speed wide area network solution, it would no longer need the Routers for its network. Specifically, YISD would not need the Routers in the interim period because of the use of layer 3 switching in conjunction with the newer transport media [fiber optic cable] that was being used to deliver network access to the campuses. The Routers were not required anymore, under such high-speed wide area network.

In light of the fact that the Routers would not be needed for the YISD computer network if the high-speed wide area network was established, YISD investigated alternative uses for the Routers for eligible projects at eligible facilities. In other words, even though the original use of the Routers became obsolete, YISD looked for new uses for the Routers that were consistent with the intent, scope, and eligibility requirements of the Program. YISD wanted any new use to be an eligible use at eligible facilities. As part of this, the Router serial numbers were inventoried and catalogued to the specific eligible site location to which they had been assigned; in other words, YISD kept track of exactly which Router went to which eligible location. It was not a situation where the Routers were to be transferred from eligible locations to ineligible locations relatively shortly after installation. In short, YISD did not want the Routers to go to waste.<sup>4</sup>

In Year 4 of the Program, YISD sought funding for a high-speed wide area network as part of its telecommunications request. YISD posted its Form 470 for Year 4 of the Program (the "Year 4 Form 470"). A true and correct copy of the Year 4 Form 470 is set forth as Exhibit "7" to the Appendix and is incorporated herein. After a procurement process, and subsequent award and

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<sup>4</sup> It is also important to remember that YISD had also acquired over 20 similar routers using its own funds, which were similarly unnecessary for the high speed wide area network. Therefore, in addition to the share paid under the Program by YISD for the Routers [between 10%-19%], YISD also had a significant financial incentive to ensure that it received the benefit of the entire cost incurred by YISD for these other self-purchased routers. In other words, YISD had invested in 20 routers using its own money, as compared to 37 routers under the Program.

signing of a contract for such project, YISD filed its Form 470 for Year 4 on January 16, 2001 (the "Year 4 Form 471"). A true and correct copy of the Year 4 Form 471 is set forth as Exhibit "8" to the Appendix and is incorporated herein. The SLD approved the Year 4 Form 471 by means of a Funding Commitment Decision Letter dated December 4, 2001 (the "Year 4 Funding Letter"). A true and correct copy of the Year 4 Funding Letter is set forth as Exhibit "9" to the Appendix and is incorporated herein. Exhibit "10" of the Appendix is a true and correct copy of an illustration of the YISD high-speed wide area network and is incorporated herein.

Previously, due to the proposed establishment of the high-speed wide area network, YISD decided that the Routers should be used in connection with a Voice Over Internet Protocol a/k/a Voice Over IP a/k/a VOIP project (the "Voice Over IP Project") for which funding was sought under Year 4 of the Program. The Voice Over IP project would allow YISD to consolidate its voice and data networks. YISD has a voice network and a separate data network [being the high-speed wide area network]. This project permits voices to travel over the data network lines, thereby allowing YISD to terminate at least one T-1 line per each of the sixty-odd campuses. Such T-1 lines are eligible for Priority 1 Program funding; through use of the Voice Over IP Project, YISD could then eliminate Program funding requests for the terminated T-1 lines, saving Program funds. In addition, the Voice Over IP Project also permitted a much greater capacity of voice to be carried than under the voice-only network. Importantly, the Voice Over IP Project in Year 4 of the Program could utilize the Routers, since the equipment to be placed into the Nortel option 11 switches under that project would require routing [and thus routers] instead of layer 3 distribution. The use of the Routers on hand would therefore obviate the need to acquire new routers as part of that Voice Over IP Project. The Voice Over IP Project sought to utilize the Routers for eligible purposes at eligible

locations. Unfortunately, Year 4 funding was denied by the SLD for such project for that year.

Thereafter, YISD reviewed extensively whether to re-seek such funding for the Voice Over IP Project for Year 5 of the Program. Again, YISD proposed use of the Routers in connection with that project. A true and correct copy of some planning documentation is set forth as Exhibit "11" to the Appendix and is incorporated herein. Ultimately, though, such project was not included in the final Form 471 for Year 5 of the Program. YISD, though, planned to continue with that project in future Program years.

The high-speed wide area network was constructed by YISD during June and July, 2002. As noted above, YISD used its own funds and other non-Program sources for the original implementation of that WAN project. During that time period, since the Routers were no longer being utilized for network purposes and YISD desired to ensure the safety of the Routers for the proposed future use, YISD removed the Routers from their initial sites in the summer of 2002 and placed them in a secure storage area pending subsequent use as planned.

In any event, even if the Voice Over IP Project had been included in YISD's request for Year 5 funding, such funding would have been denied. Indeed, YISD was denied all internal connections funding by the SLD sought by its Form 471 for Year 5 of the Program.

YISD appealed the decision of the SLD in the Year 5 Funding Letter to the Commission. By FCC Order 03-313 dated December 8, 2003 in *Matter of Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, et. al.*, CC Docket Nos. 96-45 and 97-21 (the "Ysleta Order"), the Commission effectively upheld the denial of Year 5 funding, but granted a waiver of Program rules to permit YISD to re-file its application for Year 5 funding under certain conditions.



Pursuant to the Ysleta Order, YISD in early 2004 did re-file for Year 5 funding. Unfortunately, by that time, due to changes in technology over the preceding 3 to 4 years, the Routers were now obsolete in terms of their use in the proposed Voice Over IP Project. In addition, since the Voice Over IP Project had been sought for Year 6 funding, the same funding was not sought with the Year 5 re-filing.

Shortly beforehand, YISD was already working on its proposed projects for Year 6 of the Program. In other words, YISD was required to plan for Year 6 projects before any final decision was made on its Year 5 projects. For Year 6 of the Program, YISD planned to utilize the Routers for the Voice Over IP Project. Again, YISD wanted to re-use the Routers for an eligible project at eligible locations. On or about November 4, 2002, YISD posted its Form 470 for Year 6 of the Program (the "Year 6 Form 470"). A true and correct copy of the Year 6 Form 470 is set forth as Exhibit "12" to the Appendix and is incorporated herein. After a procurement process, and subsequent award and signing of a contract for such project, YISD filed its Form 471 for Year 6 on February 5, 2002 (the "Year 6 Form 471"). A true and correct copy of the Year 6 Form 471 is set forth as Exhibit "13" to the Appendix and is incorporated herein.

Once again, there was a significant delay by the SLD in making a decision on YISD request for funding, here under the Year 6 Form 471. In fact, the SLD did not make such a determination until almost 11 months after the beginning of Year 6. The SLD approved the Year 6 Form 471 by means of a Funding Commitment Decision Letter dated April 20, 2004 (the "Year 6 Funding Letter"). A true and correct copy of the Year 6 Funding Letter is set forth as Exhibit "14" to the Appendix and is incorporated herein. The Year 6 Funding Letter was received over 26 months after the Year 6 Form 471 was filed and over 29 months since the Year 6 Form 470 was posted. Again,

due to the delays since the Year 6 Form 471 was filed [not to mention the Year 4 and Year 5 efforts to fund the Voice Over IP Project], and the accompanying changes in technology, the Routers can no longer be reasonably utilized for the Voice Over IP Project at that time.

Nevertheless, despite its numerous tries to date, YISD did not give up on its effort to re-utilize the Routers for an eligible project at eligible locations. Specifically, in May 2003, YISD began planning to use undertake a proposed dynamic host configuration protocol a/k/a DHCP project (the “DHCP Project”), which could use the Routers. “Dynamic host configuration protocol” is a protocol for assigning dynamic IP addresses to devices on a network. This assignment can be done by either a DHCP server or an appliance such as the Routers. This method of addressing devices on a network makes it easier for adding and moving devices throughout the network. At YISD, computers and printers are constantly being added or moved at the campuses or between campuses. By setting up the computer or printer to accept a DHCP address, the DHCP appliance [here, the Routers] dynamically assigns an IP address to the device, keeps track of the IP addresses assigned, and frees up YISD staff from having to manually assign and manage IP addresses. YISD at the time had DHCP IP addresses, maintained by servers. Those servers began to reach the end of their lifespans and began to become unusable and [due to their age and obsolescence] unrepairable. YISD had the choice of acquiring new servers for the DHCP IP addresses under the Program, which were eligible for funding under the Program, or instead moving to the DHCP Project.

Rather than seek the Program funding, and for the benefits described above, YISD decided to undertake the DHCP Project. Importantly, even though YISD believes the DHCP Project was eligible was Program funding, YISD did not seek or use Program funding for the DHCP Project. YISD used its own or other resources for the DHCP Project. The DHCP Project was commenced

in October 2003 by YISD and was completed some time ago. The DHCP Project remains in effect, and the Routers continue to be used for that purpose. To be clear, the DHCP Project was first discussed before the Audit [as defined below] was concluded, and was begun almost twenty months before the Decision was issued. Under the DHCP Project, each Router was returned for use in the exact same eligible school at which such Router had been initially installed for the upgrade of the initial project. The useful life of the Routers under the DHCP Project is expected to be similar to that the Routers would have had if the old computer network had remained in place.

It is extremely important to point out that, at this time [being almost three years since the Audit was completed], all of the Routers are actually in place and in use, at the same eligible schools, for an otherwise eligible project [even though YISD used its own funds for the DHCP Project].

In 2003, USAC conducted an audit of the Year 3 funding under the Program at YISD, investigating a variety of projects and issues (the "Audit"). The Audit included a finding that the Routers were not used properly. Specifically, Finding 5 of the Audit stated as follows:

*Finding 5 - Unused routers purchased with E-rate funds*

*Condition:*

*The 37 routers purchased with E-rate funds during FY 2000 are currently being unused in storage at the ACAC building. The routers were replaced during Year 4 with improved technology products. The beneficiary had intended to use the routers in connection with funding from Year 5, but USAC denied the beneficiary's Year 5 funding request. The beneficiary has appealed this decision, and the outcome is still unknown.*

*We were unable to determine the total dollar value of the 37 routers purchased with E-rate funds due to the lack of adequate descriptions on the service provider (IBM) invoices. The fixed asset listing prepared by the Accounting Department places a value of \$6,276 for each router -- which would total \$232,212 for the 37 routers.*

*Criteria:*

*USAC does not provide specific guidance regarding the timeframe that products purchased with E-rate funds must be used. However, using the routers for such a limited time would tend to indicate poor controls over the implementation of technology products purchased with E-rate funds, and could also be viewed as a waste of USAC funds.*

YISD responded to that finding. A true and correct copy of an excerpt of the YISD Audit response, relative to such finding, is set forth as Exhibit "15" to the Appendix and is incorporated herein.

The Recovery Letter and Demand Letter each purport to be issued pursuant to the Audit. The Recovery Letter and the Demand Letter each state in relevant part as follows:

*After a thorough investigation, it has been determined that SLD will seek recovery for items not being used for educational purposes. During an audit it was noted that 37 routers were in storage and not being used. The routers cost is \$6,276 each. As a result, \$208,999.80 will need to be recovered.*

In the Decision, the SLD cites the findings from the Audit. The Decision concludes as follows:

*According to the program's procedures concerning the applicant and service provider certification that all equipment purchased with e-rate funds is solely intended to be used for educational purposes to bring information to the classroom. According to the Universal Service Order (FCC 97-157), applicants require technology plans that are based "on the reasonable needs and resources of the applicant and are consistent with the goals of the program" (par. 574). Also, "schools and libraries must prepare specific plans for using these technologies, both over the near term and into the future, and how they plan to integrate the use of these technologies into their curriculum" (par. 573). Therefore, applicants are accountable for carefully developing their technology plan, and utilizing the equipment requested and obtained with E-Rate support properly and efficiently. Consequently, the appeal is denied.*

YISD disputes that contention, and hereby appeals the Decision in accordance with the Appeal Procedures of the SLD.

Attached to the Appendix as Exhibit "16" and incorporated herein is an Affidavit of Richard Duncan. Attached to the Appendix as Exhibit "22" and incorporated herein is a Supplemental Affidavit of Richard Duncan

#### ***IV. DISCUSSION***

1. To the extent the Recovery Letter and/or Demand Letter are incorporated into the Decision, the SLD erroneously contends that YISD failed to comply with Program rules or committed waste, fraud, or abuse.

In the Decision, the SLD does not expressly base its ruling upon the contentions in the Recovery Letter and/or the Demand Letter. It is not clear whether the Decision is grounded in whole or part upon any of the allegations in those earlier documents. Nevertheless, by denying the First Letter of Appeal and Second Letter of Appeal, the SLD is effectively upholding the contentions within the Recovery Letter and Demand Letter. YISD therefore, to be safe, is addressing such issues in this Request for Review to the extent made part of the basis for the Decision. In any event, regardless of whether part of the Decision, these arguments of the YISD provide further support for reversal of the Decision.

- A. The replacement of the Routers by YISD did not violate any rule or policy in place during the relevant time period.*

Quite simply, there was no specific Commission rule in place at the time of the procurement of the Routers, the installation of the Routers, or the removal of the Routers, which required the Routers to be in place at an eligible school for a minimum period of time or which prohibited removal or transfer of the Routers [except for transfers for compensation]. Neither USAC nor the SLD had any published policy in place regarding such issue at such times, either. Indeed, the Audit admits that “*USAC does not provide specific guidance regarding the timeframe that products purchased with E-rate funds must be used.*”

It is also important to note that FCC Order No. 02-08 dated January 16, 2002, entitled “Notice of Proposed Rule Making and Order” states in relevant part, in paragraph 37, as follows:

*Our rules provide that eligible services purchased at a discount “shall not be sold, resold, or transferred in consideration for money or any other thing of value.”<sup>5</sup> Nothing in our rules, however, prevents transferring equipment obtained with universal service discounts from the eligible recipient to another entity without consideration for money or anything of value. We have received reports from state authorities, schools and libraries, and the Administrator that some recipients are replacing, on a yearly or almost-yearly basis, equipment obtained with universal service discounts, and transferring that equipment to other schools or libraries in the same district that may not have been eligible for such equipment.<sup>6</sup>*

*Although we recognize that schools and libraries may legitimately desire to upgrade their equipment frequently as a result of the rapid pace of technological change, we seek comment on whether it is appropriate to balance this desire against the impact of such action on other parties seeking discounts under the program. We seek comment on whether the program’s goals would be improved by requiring that schools and libraries make significant use of the discounted equipment that they receive, before seeking to substitute new discounted equipment. In particular, we seek comment on whether there may be insufficient incentives in the schools and libraries mechanism to prevent wasteful or fraudulent behavior, without imposing restrictions on these transfers of equipment. We specifically seek comment on whether, as a condition of receipt of universal service discounts, we should adopt measures to ensure that discounted internal connections are used at the location and for the use specified in the application process for a certain period of time.*

In short, the Commission itself has recognized that there was no rule in place preventing transfers or replacement of items purchased with Program funds between facilities or entities, so long as no consideration of value passed. Indeed, the Commission states that “[n]othing in our rule” prohibits such conduct. The Commission therefore sought comments from the public on whether or not such a rule should be adopted, and if so, what sort of restrictions should be included in such rule. Importantly, the Commission did not indicate in such Order that even annual replacement of

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<sup>5</sup> 47 C.F.R. § 54.617.

<sup>6</sup> For example, in Funding Year 3, schools that were not eligible for at least an 82 percent discount did not receive discounts for internal connections due to limited program funds. However, a school eligible for a 90 percent discount in Funding Year 3 that received internal connections could have transferred that equipment to another school in the same school district that was ineligible for Funding Year 3 discounts for internal connections due to its lower discount rate. See 47 C.F.R. § 54.507(g) (describing rules of priority); Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Further Notice of Proposed Rulemaking, FCC 01-143 (rel. April 30, 2001) (describing funding priorities for Funding Year 3).

goods using Program funds violated of any other Program rules or necessarily constituted “waste, fraud, or abuse”.

It should also be pointed out that the Semiannual Report to Congress [October 1, 2003 - March 31, 2004] of the Office of the Inspector General of the Commission provides, during a description of the OIG’s own audits of certain districts under the Program, in relevant part at page 18 of such report as follows:

*Equipment not being installed or operational. Program rules require that nonrecurring services be installed by a specified date. However, there is no specific FCC rule requiring beneficiaries to use equipment in a particular way, or for a specified period of time, or to full efficiency. Commission staff have provided guidance stating that if the equipment was uninstalled (i.e. - still in a box) that would represent a rule violation. However, Commission staff have also provided guidance stating that the rules do not require beneficiaries effectively utilize the services provided or that the beneficiaries maintain continuous network or Internet connectivity once internal connections are installed.*

The Office of Inspector General of the Commission does not indicate that removal of equipment violates Program rules. Indeed, according to that Commission report, even inefficient, incomplete, or improper use of the equipment is not in violation of Program rules.

In FCC Order 03-323 dated December 23, 2003, entitled “Third Report and Order and Second Further Notice of Proposed Rulemaking” (the “FCC Order 03-323”), the Commission adopted new rules governing a number of Program areas. In such Order, the Commission noted in relevant part, in paragraph 9, as follows:

*[N]othing in our current rules expressly preclude entities with 90 percent discounts from replacing, on a yearly or almost-yearly basis, equipment obtained with universal service discounts, and transferring that equipment to other entities with lower discount percentages that otherwise would not receive funding for such equipment due to the exhaustion of the capped amount.<sup>7</sup> The Act and our existing rules provide only that equipment purchased with universal service discounts “shall not be sold, resold, or transferred in consideration for*

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<sup>7</sup> See 47 C.F.R. § 54.617.

*money or any other thing of value.”<sup>8</sup>*

Again, the Commission has admitted that even annual replacement and transfer of equipment acquired with Program funds did not violate Program rules.

Pursuant to FCC Order 03-323, however, the Commission decided to adopt the following new rule, found at 47 C.F.R. §54.513(c), reading as follows (the “New FCC Rule”):

*Eligible services and equipment components of eligible services purchased at a discount under this subpart shall not be transferred, with or without consideration of money or any other thing of value, for a period of three years after purchase, except that eligible services and equipment components of eligible services may be transferred to another eligible school or library in the event that the particular location where the service originally was received is permanently or temporarily closed. If an eligible service or equipment component of a service is transferred due to the permanent or temporary closure of a school or library, the transferor must notify the Administrator of the transfer, and both the transferor and recipient must maintain detailed records documenting the transfer and the reason for the transfer for a period of five years.*

The FCC Order 03-323 involved a matter of rule changes, as well as proposed rulemaking, but the New FCC Rule relating to equipment transfers is the only actual rule change relevant to this discussion.

The FCC Order 03-323 specifically provided that its rule changes, including the New FCC Rule, would not be effective until a later date, indicating at paragraph 147:

*IT IS FURTHER ORDERED that Part 54 of the Commission’s rules, 47 C.F.R. Part 54, IS AMENDED as set forth in Appendix A attached hereto, effective thirty (30) days after the publication of this Third Report and Order in the Federal Register.*

The FCC Order 03-323 was published in the Federal Register on February 10, 2004. In paragraph 67 of the Federal Register notice, however, the Commission provided as follows:

*Part 54 of the Commission’s rules, is amended as set forth, effective March 11, 2004 except for §54.513(c) which contains information collection requirements that have not been*

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<sup>8</sup> 47 U.S.C. § 254(h)(3); 47 C.F.R. § 54.513.



*approved by the Office of Management Budget (OMB). The Commission will publish a document in the Federal Register announcing the effective date of that section.*

Consequently, the New FCC Rule was not made effective on March 11, 2004 along with the rest of the rule changes. Instead, its effective date would occur on an indefinite date in the future after the OMB approval was obtained. The New FCC Rule ultimately only became effective on September 10, 2004.

In any event, it is clear the New FCC Rule was not intended to be retroactive, by its terms and the Commission orders.

Nevertheless, the SLD is essentially treating the New FCC Rule as retroactive. Effectively, the Decision is wrongfully imposing the New FCC Rule retroactively upon YISD with respect to the Routers. It is generally impermissible for a law to be used to punish or sanction someone for conduct occurring prior to the adoption of the law. Indeed, in Landgraf v. USI Film Products, 511 U.S. 244, 265-267, 114 S.Ct. 1483 (1994), the United States Supreme Court, in denying the retroactive effect of a federal law, pointed out in relevant part:

*... the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.<sup>9</sup> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.<sup>10</sup> For that reason, the "principle that the legal effect of conduct should ordinarily be assessed*

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<sup>9</sup> See Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 842-844, 855-856, 110 S.Ct. 1570, 1579-1581, 1586-1587, 108 L.Ed.2d 842 (1990) (SCALIA, J., concurring). See also, e.g., Dash v. Van Kleeck, 7 Johns. \*477, \*503 (N.Y.1811) ("It is a principle of the English common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect") (Kent, C.J.); Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn.L.Rev. 775 (1936).

<sup>10</sup> See General Motors Corp. v. Romein, 503 U.S. 181, 191, 112 S.Ct. 1105, 1112, 117 L.Ed.2d 328 (1992) ("Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions"); Munzer, *A Theory of Retroactive Legislation*, 61 Texas L.Rev. 425, 471 (1982) ("The rule of law ... is a defeasible entitlement of persons to have their behavior governed by rules publicly fixed in advance"). See also L. Fuller, *The Morality of Law* 51-62 (1964) (hereinafter Fuller).